

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2091-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF351

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY J. WALKER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Jeffrey Walker appeals judgments convicting him of two counts of child enticement and two counts of sexual assault of a child as a persistent repeater. He also appeals an order denying his postconviction motion in which he requested a new trial in the interest of justice, contending the real

controversy was not fully tried because he was not allowed to confront a crime lab analyst whose preliminary work was reviewed by the State's DNA expert witness. We affirm the judgments and order.

BACKGROUND

¶2 The State's DNA expert witness, Benjamin DeStaercke, conducted a peer review of an analysis done by Samantha Delfosse, who was on maternity leave at the time of the trial. DeStaercke described a peer review as a second analyst's review of all of the notes, profiles and reports generated by the first analyst. The peer reviewer does not redo any of the extraction of biological material or DNA and does not create a new profile. Instead, after reviewing the other analyst's notes and the DNA profiles, the peer reviewer "almost independently" decides whether the known persons are included or excluded as the source of DNA extracted from the evidence. DeStaercke testified that, based on his review of the entire file, he reached an independent decision that the possible contributors of DNA found in the swabs from Walker's fingers included both Walker and the victim.

¶3 In his postconviction motion, Walker conceded DeStaercke's testimony was admitted without objection. Therefore, any error in receiving the testimony was not properly preserved. Walker also conceded he could not allege ineffective assistance of trial counsel because the case law at that time did not support an objection. *See State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919; *State v. Barton*, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93. Therefore, he requested a new trial in the interest of justice. Walker argued that he had the right to confront Delfosse because her initial DNA analysis was presented through DeStaercke, who acted as a transmitter or conduit for Delfosse's opinion.

Walker contended DeStaercke's description of Delfosse's analysis was "testimonial," implicating Walker's right to confront the witness. See *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The circuit court denied the postconviction motion, noting Delfosse's report was not admitted into evidence and her role in analyzing the DNA was essentially "done by machine, by computer." The court found DeStaercke was able to reach an independent opinion regarding the possible contributors of genetic material. Because Walker could confront DeStaercke as well as the witnesses who took the DNA samples, the court determined the issue was fully tried.

DISCUSSION

¶4 On appeal, Walker argues that a recent decision of the United States Supreme Court, *Williams v. Illinois*, 132 S. Ct. 2221 (2012), should be read to give Walker the right to confront Delfosse. In *Williams*, a divided Court upheld the defendant's conviction when an expert testifying for the prosecution utilized a DNA profile produced by a person who was not called as a witness. Justice Alito wrote the plurality opinion which three other justices joined. They concluded the outside laboratory's report was not received for its truth, and the report was not testimonial because it was produced before any suspect was identified. *Id.* at 2228, 2236-40. Justice Thomas concurred in the result, but disagreed with the plurality's conclusion that the report was not received for its truth. Justice Thomas concluded the outside report was not testimonial because it did not bear "idicia of solemnity." *Id.* at 2261 (Thomas, J., concurring). Justice Kagan dissented on behalf of three other justices, concluding the outside report was testimonial and implicated the defendant's right to confront witnesses. *Id.* at 2273 (Kagan, J., dissenting).

¶5 When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court is viewed as that position taken by those members who concurred in the judgment on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193 (1977). Walker contends that applying *Marks* to the Court's decision in *Williams* would support his right to confront Delfosse. However, this court previously applied the methodology described in *Marks* to the *Williams*' decision and concluded the position taken by the justices who concurred in the judgment on the narrowest grounds is that the DNA technician's reliance on the outside laboratory's report did not violate Williams' right to confront because the report was not testimonial. *State v. Deadwiller*, 2012 WI App 89, ¶14, 343 Wis. 2d 703, 820 N.W.2d 149, review granted, 2013 WI 22, 346 Wis. 2d 282, 827 N.W.2d 373. Walker's construction of *Marks* and *Williams* would be inconsistent with this court's opinion in *Deadwiller*. Walker argues that, if we read *Deadwiller* in this manner, then *Deadwiller* is wrongly decided. That is not for us to say. We are bound to follow our own precedent, since only the supreme court has the power to overrule, modify or withdraw language from a published court of appeals opinion. *Willowglen Acad.-Wisconsin Inc. v. Connelly Interiors, Inc.*, 2008 WI App 35, ¶18 n.6, 307 Wis. 2d 776, 746 N.W.2d 570.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

